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No. 80-354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DRESSER INDUSTRIES, INC.,
Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,
Respondent,

UNITED STATES OF AMERICA,
Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF THE PETITIONER IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI

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This reply brief principally addresses those portions of the government's responding brief that either fundamentally mischaracterize the opinion of the Court of Appeals below or attempt to retract positions previously taken by the government.

A. Conflict with *LaSalle*

In *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this Court reviewed the statutory scheme that governs the summons authority of the IRS. It concluded that even after referring a matter to the Justice Department, "logically . . . the IRS could use its summons authority under § 7602 to uncover information about the tax liability created by a fraud regardless of the status of the criminal case". 437 U.S. at 312. But this Court went on to

explain that post-referral use of the summons authority was objectionable because it would "broaden the Justice Department's right of criminal litigation discovery [and] infringe on the role of the grand jury as a principal tool of criminal accusation." *Id.*

The Court of Appeals below declined even to ponder the import of these policy interests to this case.[1] The government attempts to mask this refusal by misrepresenting the Court of Appeals decision.

Thus, the government opens its argument (Respondent's Brief, hereinafter "Res. Br.", 3) by alleging that the Court of Appeals "held that it was proper for the Commission to furnish, *and the grand jury to receive through the Department of Justice,* relevant information that the Commission *has gathered* in its independent investigation." (Emphasis added.) That is not what the Court of Appeals decision held. The Court of Appeals decision authorizes the SEC to subpoena *additional information* during the grand jury investigation, not merely to share information that it has already gathered. (*See* Court of Appeal's Opinion, Petitioner's Appendix, hereinafter "Pet. App." A-34.) In addition, the Court of Appeals decision authorizes the SEC then to share this information with the *Justice Department,* not the grand jury. (*See* Pet. App. A34-A40.)

The government attempts to blur this issue by dwelling on the discovery powers of the grand jury. This misleading emphasis diverts attention from the critical principle here: The Justice Department does not have independent

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[1] Pet. App. A-25:

> In the case of an SEC investigation there is no call for a 'prophylactic rule,' and thus no need to ponder the import of these 'policy interests,' because the SEC's authority to issue the subpoena remains undiminished after the start of a grand jury investigation.

discovery powers. The gravamen of Dresser's objection is that the Justice Department cannot make use of the SEC's subpoena authority. Consistent with *LaSalle,* the First Circuit in *In re Melvin,* 546 F.2d 1, 5 (1st Cir. 1976), recognized that the Justice Department may only conduct discovery through the grand jury. The Court of Appeals decision would confer an independent right of discovery on the Justice Department. It is no more appropriate for the Justice Department to make independent use of the SEC's compulsory powers in the present case than it was for the Department to make such use of the District Court's compulsory powers in *Melvin.*

The Court of Appeals decision thus allows the Justice Department to conduct criminal discovery through another agency's subpoena powers, thereby broadening the Justice Department's (not the grand jury's) right of criminal litigation discovery and infringing on the role of the grand jury as a principal tool of criminal accusation.

The government also seeks to rely upon an allegedly distinctive feature of the SEC statutes, namely the agency's explicit authority to turn over "such evidence *as may be available* concerning such acts or practices as may constitute a violation of any provision of this chapter . . . to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this chapter." 15 U.S.C. §78u(d). (Emphasis added.)[3] The very phrasing of the provision, however, clearly indicates that it refers to information

[3] The term "criminal proceedings" as used in the context of 15 U.S.C. § 78u(d) includes grand jury proceedings. *See* Fed. R. Crim. P. 1, incorporating Fed. R. Crim. P. 6; concurring opinion of Judge Timbers in *United States* v. *Griesa,* 481 F.2d 276, 285 (2d Cir. 1973)

available *at the time of the referral.* It is in no way inconsistent with the *LaSalle* rule and bears no resemblance whatever to the authority here claimed by the SEC. The IRS had in *LaSalle,* as the SEC has in the present case, prima facie statutory authority to conduct the investigation in question. But this Court held that, once a criminal referral is made, such prima facie statutory authority must yield before the higher interests of controlled criminal litigation discovery and grand jury integrity.

Dresser believes that its overseas employees are entitled to nothing less than a grand jury investigation—an investigation conducted by and through the grand jury, with the full secrecy provisions of Fed. R. Crim. P. 6(e), (hereinafter "Rule 6(e)") and other traditional safeguards. This can only be accomplished by preventing the Justice Department from bypassing the grand jury and, with the SEC, prepackaging an investigation for the grand jury's rubberstamp. Only a lawful, properly conducted grand jury investigation can serve as "a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor." *United States* v. *Dionisio,* 410 U.S. 1, 17 (1973).

B. Disclosure of Matters Occurring in the Grand Jury

The government also denies, incorrectly, that the Court of Appeals opinion permits disclosure of matters occurring before the grand jury to the SEC. The Court of Appeals, using the legislative history of the Foreign Corrupt Practices Act as authority, concluded that a "close working relationship" between the grand jury/Justice Department

investigation and the SEC civil investigation of Dresser is appropriate. It reasoned that

> [s]ince such a "close working relationship" will govern the activities of the agencies in enforcing the laws against questionable foreign payments under the new statute, it would be impractical for us to attempt to screen the agencies from each other when they are investigating the same sort of offense under the former statutes. Pet. App. A-37.

The right to a "close working relationship" and a sharing of information during a grand jury investigation was successfully urged upon the Court of Appeals by both the SEC and the Justice Department, because each agency wished to avoid the restrictions placed upon them by the panel decision. *See* SEC Petition for Rehearing, 2 ("it is critical . . . that the Commission and the Justice Department be able to cooperate and exchange information . . ."); Justice Department Brief for Rehearing en banc, 17 ("Congress encouraged a 'close working relationship between the Justice Department and the SEC' in investigating questionable foreign payments . . ."). Neither agency acknowledged before the Court of Appeals that such cooperation and sharing of information must take place within Rule 6(e) in order to prevent unauthorized disclosure to the SEC of matters occurring before the grand jury.

The Court of Appeals failed to appreciate, therefore, that the authorization to share grand jury information with a civil agency must be subject to Rule 6(e), although Dresser had specifically pressed this issue. As a result, the

Court of Appeals authorized this close working relationship without Rule 6(e) protection, thereby enabling the government to play fast and loose with the rights of persons under investigation by a grand jury. This result is in conflict with the decisions in *In re Perlin,* 589 F.2d 260 (7th Cir. 1978), in *United States* v. *Birdman,* 602 F.2d 547 (3rd Cir. 1979) *cert. denied,* 444 U.S. 1032 (1980), and in *United States* v. *Dondich,* 460 F. Supp. 849 (N.D. Cal. 1978).

This point has finally been recognized by the government. Rather than admit that the portion of the Court of Appeals' opinion captioned "Cooperation Between SEC and Justice" (Pet. App. A34-40) is in error, the government now claims that this issue is not before this Court. The error is central to this case. The need for a "close working relationship" was the fundamental rationale for the Court of Appeals' rejection of both the prophylactic *LaSalle* rule and the protective order provided by the panel's opinion. Dresser may never have another opportunity to prevent unauthorized disclosure of grand jury matters to the SEC. The issue, therefore, is properly before this Court.

C. The Post-reference Status of This Case

The government's statement of the case (*See,* e.g., Res. Br. 1-2 and n.1) also creates the impression that this case is still in the pre-referral stage, and that it is mere happenstance that the grand jury and the SEC are both investigating the same parties under the same laws at the same time. In the Court of Appeals, however, the government expressly admitted that the SEC referred the *Dresser* case to the Justice Department for investigation of possible securities violations.[4] Thus, two cases cited by the govern-

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[4] The Brief for the United States on Rehearing En Banc states at 15, n. 13:

> The panel majority correctly observed that: "[t]he reference made in this case was 'informal,' i.e., the

(Footnote continued on next page.)

ment as authorizing enforcement of civil subpoenas, *United States* v. *Kordel*, 397 U.S. 1 (1970) and *United States* v. *Fields*, 592 F.2d 638 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979), are inapposite because those cases deal only with pre-referral enforcement of a civil subpoena.[5]

D. The SEC Confidentiality Agreement

In order to avoid complying with its obligations under the confidentiality agreement entered into between the SEC and Dresser, the government now claims (Res. Br. 11) that Dresser itself breached the agreement. Dresser is and has always been prepared to try this issue at the appropriate time. It has not yet been allowed to do so. The Court of Appeals disposed of this branch of the case on the ground that the SEC "never agreed to forego completely its right to subpoena the materials in question." (Pet. App. A-41.) Dresser concedes that the SEC did not forego that right, but asserts that the SEC promised not to exercise the right *until* it had first examined the materials on a confidential basis, and determined if there were any need for further investigation.

(Footnote continued from preceding page.)

SEC made its investigating files available to the Justice Department pursuant to an order of the SEC, but the reference was not accompanied by a recommendation for prosecution. See *SEC* v. *United Brands Co.*, Fed. Sec.L.Rep. (CCH) ¶ 95,263 (D.D.C. July 18, 1975) (SEC decision to make files available to Justice Department equivalent to a 'reference' under the Exchange Act.)"

[5] The only other case relied upon by the government in this area is *Standard Sanitary Manufacturing Co.* v. *United States*, 226 U.S. 20 (1912). *Standard Sanitary* involved simultaneous enforcement proceedings in which the government was not seeking civil discovery. The points at issue in this case were never considered.

Dresser was confident that such an evaluation would result in termination of the matter at that stage. It was this commitment—to protect Dresser's overseas employees by first confidentially examining and evaluating the materials—that induced Dresser to conduct the internal investigation. The legal issue involved here, therefore, is not that defined by the Court of Appeals, but rather whether the SEC will be held to the pre-subpoena confidentiality procedure that it promised in order to induce Dresser's inquiry.

Respectfully submitted,

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